IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 174 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

ARVIND JEWELLERS

Appearance:

1. INCOME TAX REFERENCE No. 174 of 1989
MR MAUNA BHATT for Petitioner No. 1
MR RK PATEL for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 19/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

At the instance of the revenue, the following

question of law is referred to for the opinion of this Court for assessment year 1981-82 :-

1. Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in setting aside the order made by the Commissioner of Income-tax under section 263 of the I.T. Act, 1961 ?

2. Whether the conclusion reached by the appellate Tribunal in setting aside the order made by the Commissioner of Income-tax under Section 263 of the I.T. Act, 1961 is even otherwise sustainable in law ?

2. The assessee is a partnership firm and had filed its return of income disclosing net loss of Rs.2,777/- in business of purchase and sale of ornaments and jewellery. The Income-tax Officer issued notices under Sections 143(2) and 142(1) of the Income-tax Act, 1961 alongwith the requirement letter. After considering the material produced by the assessee and the explanation offered, the Income-tax Officer has framed the assessment determining the total income at Rs.32,900/-. The Commissioner of Income-tax has found the said order of the Income-tax Officer as erroneous and prejudicial to the interest of the revenue and, therefore, issued notice under Section 263 of the Act. The Commissioner was of the view that there was search at the business premises of the assessee firm and the residential premises of the assessee firm and residential premises of the partners on 28.11.1992. During the course of search unaccounted cash amounting to Rs.1,80,000/- was seized. Similarly, silver ornaments and jewellery valued at Rs.7,02,728/- were seized. While finalizing the assessment for assessment year 1981-82, the Income-tax Officer has added Rs.15,000/- as the assessee's income from undisclosed sources represented by the credits in the accounts of seven parties as mentioned in the order under Section 263 of the Act. After narrating in detail the facts of the case as well as the explanation offered by the assessee in reply to the notice issued under Section 263 of the Act, the Commissioner of Income-tax has come to the conclusion that the assessment order passed by the Income-tax Officer under Section 143(3) for assessment year in question determining the total income at Rs.32,900/- is erroneous and prejudicial to the interest of the revenue, in so far as the Income-tax Officer has not carried out any investigation either while adding certain amounts in

the total income or while accepting the explanations on the various points as discussed in the said order. The Commissioner of Income-tax has, therefore, set aside the order passed by the Income-tax Officer under Section 143(3) of the Act with a direction to pass a fresh order in accordance with law after carrying out necessary investigations with regard to various explanations offered by the assessee.

3. Being aggrieved by the said order, the assessee preferred an appeal before the Income-tax Appellate Tribunal and objected to the order so passed by the Commissioner. The Tribunal has considered the rival submissions of the parties in a great length and also referred to and relied on the authorities cited by the respective parties. The Tribunal has observed in para 7 of its order that from the material already brought on record, it is difficult to hold that the Income-tax Officer has not properly investigated and enquired into the case in depth. The Tribunal has found from the notice issued by the Income-tax Officer under Section 142(1) of the Act that the Income-tax Officer had raised all possible enquiries in view of a search conducted under Section 132 of the Act. The Tribunal has further observed that the Income-tax Officer was fully aware of the gravity of the situation and the interest of the revenue. After obtaining necessary information from the assessee, the Income-tax Officer has framed the assessment wherein he had not accepted the explanation given by the assessee in its entirety and had in fact made certain additions. The Tribunal has further taken the fact into account that as against total loss of Rs.2,777/- shown by the assessee, the Income-tax Officer had framed the assessment on a total income of Rs.34,350/-. In this view of the matter, the Tribunal was of the view that the Commissioner of Income-tax was not justified in initiating the proceedings under Section 263 of the Act. It was further observed by the Tribunal that merely on the ground that on the material already brought on record, better assessment could have been framed than that framed by the Income-tax Officer, the action under Section 263 cannot be taken. After considering all the issues, the Tribunal has set aside the order of the Commissioner of Income-tax and it is that order which is under challenged before us in this reference.

4. Heard Mrs Mauna Bhatt, the learned counsel appearing for the applicant-revenue and Mr RK Patel, the learned advocate appearing for the respondent-assessee. The revenue's case was, as canvassed by Mrs Bhatt, that

since the material which was available with the Income-tax Officer was not considered while finalizing the assessment, the order passed on that basis is erroneous and prejudicial to the interest of the revenue. According to the revenue before passing the order, full enquiry and investigation ought to have been made by the Income-tax Officer and since this was no done, it has caused loss to the revenue and in this view of the matter, the order so passed was erroneous and prejudicial to the interest of the revenue and the Commissioner was justified while taking action under Section 263 of the Act. In support of her contention, she had relied on the decision of the Supreme Court in the case of CIT vs. Manjunathesware Packing Products and Camphor Works, (1998) 231 ITR 53.

5. Mr RK Patel, the learned advocate appearing for the respondent-assessee has drawn our attention to the decision of the Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT, (2000) 243 ITR 83 wherein the Supreme Court has observed as under :-

> "A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely (1) the order the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined

> to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law."

6. From the above observations made by the Supreme Court, it is clear that the provisions of Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted and incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. The Supreme Court has also made it clear that the phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer and that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. It was further emphatically stated that when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.

7. Coming to the facts of the present case, it is the finding of fact given by the Tribunal that the assessee has produced relevant material and offered explanation in pursuance of the notices issued under Section 142(1) as well as Section 143(2) of the Act and

after considering those material and explanation, the Income-tax Officer has come to a definite conclusion. The Commissioner of Income-tax did not agree with the conclusion reached by the Income-tax Officer. Section 263 of the Act does not empower him to take action on these facts to arrive at the conclusion that the order passed by the Income-tax Officer is erroneous and prejudicial to the interest of the revenue. Since the material was there on record and the said material was considered by the Income-tax Officer and a particular view was taken, the mere fact that different view can be taken, should not be the basis for an action under Section 263 of the Act and it cannot be held to be justified.

8. In view of this and following the principles laid down by the Supreme Court in Malabar Industrial Co. Ltd. (Supra), we are of the view that having regard to the facts and circumstances of the case, the Tribunal was justified in setting aside the order passed by the Commissioner of Income-tax under Section 263 of the Act. We, therefore, answer both the questions in the affirmative i.e. in favour of the assessee and against the revenue.

The reference is accordingly disposed of with no order as to costs.

(M.S. Shah, J.) (K.A. Puj, J.)

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